Supreme Court, U.S.
FILED
MAR 21 2007
OFFICE OF THE CLERK

No. 06-705

IN THE

Supreme Court of the United States

DOW CORNING CORPORATION,

Petitioner,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, MERRILL LYNCH, PIERCE, FENNER & SMITH, BANK OF AMERICA, N.A., BANK OF NEW YORK, JP MORGAN CHASE, DK ACQUISITION PARTNERS, L.P., HALCYON MANAGEMENT CO. LLP, HALCYON OFFSHORE MANAGEMENT CO., LLC, ANGELO, GORDON & CO., DAVIDSON KEMPNER INTERNATIONAL ADVISORS, M.H. DAVIDSON CO., INC., APPALOOSA MANAGEMENT, LLC, FRANKLIN MUTUAL ADVISORS, LLC, BEAR STEARNS & CO., INC., BEAR STEARNS GOVERNMENT SECURITIES, INC., BEAR STEARNS INVESTMENT PRODUCTS, INC., CUSTODIAL TRUST CO., NEWSTART FACTORS, INC., FARALLON CAPITAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS II, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS III, L.P., FARALLON CAPITAL OFFSHORE INVESTORS, INC., FARALLON CAPITAL MANAGEMENT, LLC, JP MORGAN CHASE BANK, CONSOLIDATED PRESS INTERNATIONAL, THE COMMON FUND, TINICUM PARTNERS LP, CREDIT SUISSE FIRST BOSTON MANAGEMENT CORP., AMROC INVESTMENTS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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In *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, No. 05-1429 (Slip op. Mar. 20, 2007), this Court held that an unsecured creditor's contract-based claim for attorney's fees could not be disallowed solely because the fees at issue were incurred litigating issues of bankruptcy law. *See id.* at 5-10 (rejecting *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991)). The opinion, however, expressly declined to decide whether an award of attorney's fees on an unsecured claim is precluded by the Bankruptcy Code in 11 U.S.C. § 506(b). *See id.* at 10-12. As the Court explained, the § 506(b) issue was not properly presented in that case, because the respondent there had not raised the issue either below (such that "none of the lower courts had occasion to address it") or in the brief in opposition to the petition for certiorari. *Id.* at 11.

This case, in sharp contrast, allows this Court to resolve this unsettled issue. Petitioner Dow Corning raised the § 506(b) issue below, the Sixth Circuit addressed that issue at length, *see* Pet. App. 20-24a, and the issue is encompassed by the second question presented in the petition for certiorari, *see* Pet. i.

In particular, Dow Corning argued below that because § 506(b) specifically authorizes the recovery of attorney's fees for oversecured claims, but does not authorize the recovery of such fees for unsecured claims, the Bankruptcy Code implicitly bars the recovery of such fees for unsecured claims. *See* Pet. App. 21a (describing Dow Corning's argument). The Sixth Circuit squarely rejected that argument. According to the Sixth Circuit, the negative implication of § 506(b) was not sufficiently strong to bar the recovery of attorney's fees for unsecured claims. *See id.* at 22-24a.

That decision flatly contradicts both the reasoning of a prior decision of this Court and a long line of holdings from various other circuits and bankruptcy courts. In *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365 (1988), this Court held that

§ 506(b) implicitly bars the recovery of post-petition interest by undersecured creditors. As the Court explained, Congress went out of its way to make § 506(b) applicable *only* to oversecured claims. *Id.* at 373. If Congress had intended to grant an undersecured creditor the same rights, it would not have limited the statute to claims "secured by property the value of which ... is greater than the amount of such claims." *Id.* Although *Timbers* involved a claim for post-petition interest, not attorney's fees, its reasoning applies with equal force with respect to both claims. *See* Br. of *Amici Curiae* Law Professors in Support of Resps., *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, No. 05-1429, at 8 ("Section 506, which deals with attorneys' fees, as well as interest, should have the same substantive effect of disallowing postpetition attorneys' fees for undersecured creditors, and by extension for wholly unsecured creditors as well.").

The Sixth Circuit's holding also contradicts a long line of cases construing § 506(b) to authorize awards of fees and costs only to oversecured creditors. *See, e.g., In re Welzel*, 275 F.3d 1308, 1317-18 (11th Cir. 2001) (holding that § 506(b) affords "preferential treatment" to oversecured claims); *In re Schriock Const., Inc.*, 104 F.3d 200, 201 (8th Cir. 1997) ("To recover attorney's fees under section 506(b), then, a creditor must establish ... that it is oversecured"); *Baybank-Middlesex v. Ralar Distributors, Inc.*, 69 F.3d 1200, 1202 (1st Cir. 1995) ("Under [§ 506(b)], only 'oversecured' creditors are entitled to receive postpetition interest and loan-related fees and costs [including attorney's fees]."); *see also In re Hedged-Inv. Assocs., Inc.*, 293 B.R. 523, 526 (Bankr. D. Colo. 2003); *In re Loewen Group Int'l, Inc.*, 274 B.R. 427, 444-45 (Bankr. D. Del. 2002); *In re Smith*, 206 B.R. 113, 115 (Bankr. D. Md. 1997); *In re Woodmere Investors Ltd. P'ship, Inc.*, 178 B.R. 346, 355-56 (Bankr. S.D.N.Y. 1995); *In re Saunders*, 130 B.R. 208, 210 (Bankr. W.D. Va. 1991); *In re Sakowitz, Inc.*, 110 B.R. 268, 272 (Bankr. S.D. Tex. 1989).

In reaching its decision, the Sixth Circuit relied instead on a line of cases espousing the minority view that § 506(b) does not authorize awards of fees and costs only to oversecured creditors. *See* Pet. App. 23-24a (citing *In re United Merchants & Mfrs., Inc.*, 674 F.2d 134, 137 (2d Cir. 1982); *In re Fast*, 318 B.R. 183, 194 (Bankr. D. Colo. 2004); *In re New Power Co.*, 313 B.R. 496, 510 (Bankr. N.D. Ga. 2004); *In re Carter*, 220 B.R. 411, 418 (Bankr. D.N.M. 1998)); *see also Matter of 268 Ltd.*, 789 F.2d 674, 678 (9th Cir. 1986) (construing § 506(b) as allowing fees to unsecured creditors). This case thus allows this Court to answer the question left open in *Travelers* and to resolve the conflict among the lower courts on this important issue of bankruptcy law.[1]

In addition, the first question presented in Dow Corning's petition for certiorari is worthy of review in its own right. Separate and apart from the § 506(b) issue, the Sixth Circuit held that a party may collaterally attack a final confirmation order by asserting that the order violates the Bankruptcy Code. That holding undermines the core principle of finality that is imperative to the functioning of the bankruptcy system. *See* Pet. 8-9, 14-15. The holding also directly contradicts holdings from the Fourth, Fifth and Ninth Circuits. *See id.* at 10-13. Whether in conjunction with the § 506(b) issue or separately, this question warrants review by this Court.

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[1] Notwithstanding the Sixth Circuit's suggestion to the contrary, it makes no difference that Dow Corning is a solvent debtor. This Court's statement in *Timbers* that both undersecured and oversecured creditors can recover post-petition interest when the debtor is solvent, *see* 484 U.S. at 379, is based entirely on the fact that such recovery is explicitly allowed by the Bankruptcy Code, *see* 11 U.S.C. § 726(a)(5). There is no similar provision allowing for the recovery of attorney's fees when the debtor is solvent.

For these reasons, and for the reasons stated in the Petition for Certiorari and Reply to Briefs in Opposition, this Court should grant the petition for certiorari.

Respectfully submitted,

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